LIBRARY
SUPREME COURT, U.S.

Office Supreme Court, U.S.
FILED
AUG 8 1957
JOHN T. FEY, Clerk

No. 256

In the Supreme Court of the United States.

OCTOBER TERM, 1957.

J. THOMAS MILEY,
Petitioner,
v.
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY ET ALS.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENTS COLUMBIAN NATIONAL LIFE INSURANCE COMPANY AND LOYAL PROTECTIVE LIFE INSURANCE COMPANY, IN OPPOSITION.

LOTHROP WITHINGTON,
CHARLES C. WORTH,
73 Tremont Street,
Boston 8, Massachusetts,
Attorneys for Respondents Columbian National Life Insurance Company and Loyal Protective Life Insurance Company.

WITHINGTON, CROSS, PARK & MCCANN,
73 Tremont Street,
Boston 8, Massachusetts,
Of Counsel.

Table of Contents.

Opinion below 1

Jurisdiction 2

Question presented 2

Statutes involved 2

Statement 3

Argument 5

I. The decision below that the Sherman Act had no application to the award of this state insurance contract, and that plaintiff failed to set forth a legal injury to his business or property is clearly correct 5

II. The asserted conflict with decisions of Courts of Appeal for other Circuits does not exist 8

III. There is no substantial question of federal law 11

Table of Authorities Cited.

Cases.

American Banana Co. v. United Fruit Co., 213 U.S. 347 12

Congress Building Corp. v. Loew's, Inc., 1957 (C.C.H.) Trade Cases, par. 68,725. 9, 10

Gifford v. Commissioner of Public Health, 328 Mass. 608 7

Harrison v. Paramount Pictures, 115 F. Supp. 312, 211 F. (2d) 405 9, 10

Keogh v. Chicago & Northwestern Railway Co., 260 U.S. 156 7

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 10, 11

Melrose Realty Co., Inc., v. Loew's, Inc., 234 F. (2d) 518 9, 10

Melrose Realty Cos. Inc., v. Loew's, Inc., 352 U.S. 890 10
Perkins v. Lukens Steel Co., 310 U.S. 113 8
Productive Inventions, Inc., v. Trico Products Corp., 224 F. (2d) 678 9, 10
Roseland v. Phister Mfg. Co., 125 F. (2d) 417 9
Snow Crest Beverages, Inc., v. Recipe Foods, Inc., 147 F. Supp. 407 10
Steiner v. 20th Century-Fox Film Corp., 232 F. (2d) 190 9
Wisconsin Electric Co. v. Dumore Co., 282 U.S. 813 10

STATUTES, ETC.

McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 4, 6, 11
Sherman Anti-Trust Act, 15 U.S.C. §§ 1 and 15 6, 7, 12
28 U.S.C. § 1254 (1) 2

Mass. Acts of 1935, c. 628 3
Mass. G.L. (Ter. Ed.) c. 32A 4, 5
Sec. 4 2
Mass. G.L. (Ter. Ed.) c. 176D 4, 6
Sec. 1 6
Sec. 9 7

In the Supreme Court of the United States.

OCTOBER TERM, 1957.

No. 1156.

J. THOMAS MILEY,
Petitioner,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY ET ALS.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENTS COLUMBIAN NATIONAL LIFE INSURANCE COMPANY AND LOYAL PROTECTIVE LIFE INSURANCE COMPANY IN OPPOSITION.

Opinion Below.

The opinion of the District Court is reported at 145 F. Supp. 299. It also appears in the record at pp. A28-A33.

The per curiam affirmance by the Court of Appeals for the First Circuit is reported at 242 F. (2d) 758. It is printed at p. A36 of the record.

Jurisdiction.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254 (1).

Question Presented.

Has a claim for treble damages under the Sherman Act been stated where the complaint is brought against the members of the Massachusetts State Employees' Group Insurance Commission, certain domestic insurance companies and their officers by an insurance broker who alleges a loss of servicing fees or commissions due to a conspiracy among the defendants, because the Commission awarded a group insurance contract with the Commonwealth of Massachusetts to a defendant domestic insurance company on terms equal to that previously submitted by plaintiff upon behalf of a foreign insurance company although this Commission had been created to obtain such insurance by a special Massachusetts statute and had been empowered to "negotiate with and purchase, on such terms as it deems to be in the best interest of the commonwealth and its employees"? (See Massachusetts G.L. (Ter. Ed.) c. 32A, sec. 4.)

Statutes Involved.

The statutes involved are adequately set forth in the petition at pp. 3-4, and Appendix A of the petition, pp. 35-45.

Statement.

Due to the argumentative interpolations of the statement in the petition, it seems appropriate to resummarize the allegations of the complaint as follows:

By November 16, 1955, the individual defendants, Fabisak, Humphreys, Gooch, Deely and Sheridan, were appointed as a State Employees' Group Insurance Commission under chapter 628 of the Acts of 1955 of the Commonwealth of Massachusetts (R. p. A9).

The Commission thereupon published "An Invitation to All Insurance Companies Licensed To Do Business in Massachusetts," which invited bids or proposals for group life, accidental death and dismemberment insurance, and group hospital, surgical and medical coverage for employees of the Commonwealth in accordance with specifications established by the Commission (R. p. A10).

The plaintiff, an insurance broker, worked out and submitted a joint bid by Minnesota Mutual Life Insurance Company (hereinafter called "Minnesota"), a Minnesota insurance company licensed to do business in Massachusetts, Massachusetts Hospital Service, Inc. (Blue Cross) and Massachusetts Medical Service (Blue Shield). This proposal offered greater benefits for a three-year contract term than were offered by any of the other insurance companies which submitted proposals by December 1, 1955 (R. pp. A10-R12).

The defendant members of the Commission ascertained that Blue Cross and Blue Shield would provide the same medical, surgical and hospital coverage included in its offer with Minnesota in combination with any other insurance company offering a rate as low as Minnesota (R. p. A14).

The defendants (except Boston) thereupon entered into a combination and conspiracy to equal or better Minne-

sota's offer and deprive Minnesota of the contract. The defendant insurance companies then in the combination could not offer a rate below $1.20 per month per thousand without violating their right to do business in New York. The defendant Boston, which did not do business in New York, was then brought into the combination and submitted an offer of 90 cents per month per thousand dollars, the same as Minnesota's rate (R. pp. A15-A17).

The Commission awarded the contract to Boston, which thereupon allotted 95% of the insurance to the other defendant companies by way of reinsurance (R. p. A18).

As a result of this combination or conspiracy, Minnesota failed to receive the award, and the plaintiff was thereby deprived of compensation he would have received for servicing the contract and of commissions and service fees for new business which would have resulted had the contract been awarded to Minnesota (R. p. A19).

The District Court allowed defendants' several motions to dismiss the complaint and ordered the complaint dismissed. In its decision the Court pointed out that what had been done occurred in the course of negotiations authorized by a special Massachusetts statute (Massachusetts G.L. (Ter. Ed.) c. 32A) which gave the Commission "broad discretion to purchase insurance on such terms as it deemed to be in the best interest of the Commonwealth and its employees," and further, that Massachusetts in response to the intent of Congress in the McCarran-Ferguson Act, 15 U.S.C., §§ 1011-1015, had enacted Massachusetts G.L. (Ter. Ed.) c. 176D in complete "regulation of trade practices in the business of insurance" in Massachusetts, and hence the Sherman Act had no application (R. pp. A30-A31).

In addition, the Court asserted that plaintiff had not set forth any legal injury to his business or property, stating in the course of its discussion of this point that "The com-

mission was not required to award the contract to Minnesota on the basis of its low bid. It was clearly free to negotiate with other companies to get an equally low offer from some competitor" (R. p. A31).

Finally the District Court stated that as to the five commission members the action was, in effect, an action against the state over which "the jurisdiction of this court, in the absence of any waiver by the state of its immunity, does not extend" (R. p. A33).

The United States Court of Appeals for the First Circuit affirmed the District Court decision per curiam (R. p. A36).

Argument.

It is manifest that there is no occasion for further review by this Court, for the record discloses none of the normal grounds for granting a writ of certiorari.

I.

The Decision Below That the Sherman Act Had No Application to the Award of This State Insurance Contract, and That Plaintiff Failed to Set Forth A Legal Injury to His Business or Property Is Clearly Correct.

The cause, as recognized by the Courts below, involves a very narrow, peculiarly local issue, namely, the awarding of an insurance contract by the Commonwealth of Massachusetts under a special statute, Massachusetts G.L. (Ter. Ed.) c. 32A.

The Commonwealth was not entering into the insurance business. It was purchasing insurance for itself and its employees.

Thus the transaction obviously was regulated by the statute which created the Commission and authorized it to

"negotiate with and purchase" such insurance "on such terms as it deems to be in the best interest of the commonwealth and its employees . . ." (Appendix A of petition, p. 38).

If for no other reason, accordingly, the transaction was not within the contemplation of the Sherman Act. The matter was a special, unique situation regulated by a special statute governing the very award of this insurance business.

In addition the Commonwealth of Massachusetts had expressly enacted General Laws (Ter. Ed.) c. 176D as a general insurance business regulation in response to the invitation of the McCarran-Ferguson Act (15 U.S.C. §§ 1011-1015).

Section 1 of said chapter 176D (as inserted by Acts of 1947, c. 659) provides:

> "The purpose of this chapter is to regulate trade practices in the business of insurance in accordance with the intent of congress as expressed in the act of congress of March nine, nineteen hundred and forty-five (Public Law 15, 79th Congress), by defining, or providing for the determination of, *all such practices* in this commonwealth which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." (Emphasis supplied.) (Appendix A of petition, p. 42.)

The insurance business involved, having thus been completely "regulated" by the Commonwealth of Massachusetts, the transaction was exempt from the Sherman Act.

Petitioner's elaborate argument (petition, pp. 12-29), in essence, attempts to assert that the words of the McCarran-Ferguson Act "to the extent that such business is not

regulated by State law" should be construed as though they contained the additional provision "and to the extent that such state law does not provide the same remedies as the foregoing acts."

No such requirement can be read into the plain wording of the Act.

Indeed, although petitioner resorts to the legislative history of the Act, he is unable to quote any congressman or senator who stated that he intended any such additional requisite.

Petitioner is, of course, aware that, if what is alleged was improper, he or Minnesota could have sought to quash the award (*Gifford* v. *Commissioner of Public Health*, 328 Mass. 608), or sought to enjoin the award under chapter 176D, section 9 (Appendix to petition, pp. 43-44).

His contention, however, is that Massachusetts did not give him any right to sue for treble damages, and therefore he had a right to sue in the Federal Court under the Sherman Act, although Massachusetts had otherwise completely "regulated" this transaction.

The circumstances of this cause clearly warranted the denial of any such right by the District and Circuit Courts.

Moreover, under the unique facts of this case it is manifest that petitioner suffered no legal injury to his business or property.

"Injury implies violation of a legal right." *Keogh* v. *Chicago & Northwestern Railway Co.*, 260 U. S. 156, 163.

Obviously, plaintiff's rights could rise no higher than his principal's, Minnesota.

Minnesota failed to obtain the award because, according to the allegations, the awarding authority conferred and combined with other defendants to obtain as good or a better bid from a Massachusetts company under a statute which gave it the right to "negotiate with and purchase, on such terms as it deems to be in the best interest of the

commonwealth and its employees." (Appendix to petition, p. 38).

It has long been decided that an unsuccessful bidder for a governmental contract has no standing to claim a legal injury dependent upon a bidding statute.

Perkins v. *Lukens Steel Co.*, 310 U.S. 113, 126-128:

> "Section 3709 of the Revised Statutes requires for the Government's benefit that its contracts be made after public advertising. It was not enacted for the protection of sellers and confers no enforceable rights upon prospective bidders.
>
> "... That Act does not depart from but instead embodies the traditional principle of leaving purchases necessary to the operation of our Government to administration by the executive branch of Government, with adequate range of discretion free from vexatious and dilatory restraints at the suits of prospective or potential sellers. It was not intended to be a bestowal of *litigable rights upon those desirous of selling to the Government;* it is a self-imposed restraint for violation of which the Government—but not private litigants—can complain."

Manifestly, if Minnesota suffered no legal injury, the plaintiff's alleged injuries were not legal injuries within the Act but were, as the District Court said, "remote and speculative" (R. p. A31).

II.

The Asserted Conflict with Decisions of Courts of Appeal for Other Circuits Does Not Exist.

Despite the instant cause being manifestly factually unique, the petitioner seizes upon the District Court's

statement that "The injuries set forth thus seem to fall within the class of indirect and speculative injuries for which plaintiff cannot recover under 15 U.S.C.A. 15. *Melrose Realty Co., Inc. v. Loew's, Inc.*, 234 F. 2d 518; *Productive Inventions Inc. v. Trico Products Corp.*, 224 F. 2d 678" (R. p. A32), as creating a direct conflict in decisions with the Seventh Circuit in *Roseland v. Phister Mfg. Co.*, 125 F. (2d) 417, and *Congress Building Corp. v. Loew's Inc.*, 1957 (C.C.H.) Trade Cases, par. 68,725, and the Ninth Circuit in *Steiner v. 20th Century-Fox Film Corp.*, 232 F. (2d) 190 (Petition, pp. 29-31).

It seems incomprehensible how the petitioner could baldly assert a conflict of decision with the instant case on the basis of the above citations in view of their dissimilar facts and of statements contained in these very cases. The most that could be asserted would be that the Court in *Congress Building Corp. v. Loew's Inc.*, 1957 (C.C.H.) Trade Cases, par. 68,725, refused to follow the rationale of the decisions in *Melrose Realty Co., Inc., v. Loew's, Inc.*, 234 F. (2d) 518, and *Productive Inventions, Inc., v. Trico Products Corp.*, 224 F. (2d) 678 (both of which relied upon *Harrison v. Paramount Pictures*, 115 F. Supp. 312, 211 F. (2d) 405).

It should be sufficient, therefore, to make the following observations to indicate factual differences and lack of conflict.

Roseland v. Phister Mfg. Co., 125 F. (2d) 417, involved a direct injury to an exclusive sales agent when his employer combined with others to suppress competition and restrict his sales territory.

Steiner v. 20th Century-Fox Film Corp., 232 F. (2d) 190, involved a theatre lessor's complaint that defendants had combined with its lessees to force favorable concessions to the lessees. To the contrary of what petitioner asserts at page 31 of the petition, the Court expressly distinguishes

Harrison v. *Paramount Pictures*, 115 F. Supp. 312, 211 F. (2d) 405, stating at p. 193: "The cases cited by the appellees are not factually similar to the case at bar."

Congress Building Corp. v. *Loew's, Inc.*, 1957 (C.C.H.) Trade Cases, par. 68,725. (7th Cir. May 31, 1957) involved a theatre lessor's complaint against its lessee and others for suppressing competition. In allowing recovery the Court does refuse to follow the rationale of no recovery for remoteness adopted in *Harrison* v. *Paramount Pictures*, 115 F. Supp. 312, 211 F. (2d) 405 (a theatre lessor case) and followed in *Melrose Realty Co.* v. *Loew's, Inc.*, 234 F. (2d) 518 (theatre lessor), and *Productive Inventions, Inc.*, v. *Trico Products Corp.*, 224 F. (2d) 678 (involving a patent licensor's complaint). In the course of its discussion, however, the Court at par. 72,959 refers to "factually dissimilar situations" and includes therein *Productive Inventions, Inc.*, v. *Trico Products Corp.*, 224 F. (2d) 678, the instant case, and *Snow Crest Beverages, Inc.*, v. *Recipe Foods, Inc.*, 147 F. Supp. 407 (cited in petition at p. 30).

Moreover, it should be noted that this Court has already denied certiorari in *Melrose Realty Co., Inc.*, v. *Loew's, Inc.*, 352 U.S. 890, and *Productive Inventions, Inc.*, v. *Trico Products Corp.*, 350 U.S. 936.

The asserted conflict in decisions does not in truth exist and there is not that ". . . real and embarrassing conflict of opinion and authority between the circuit courts of appeal" (*Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393), which alone justifies certiorari.

Rather the attempt to assert a conflict arises from "differences in states of fact" for which a writ of certiorari has often been dismissed as improvidently granted.

See *Wisconsin Electric Co.* v. *Dumore Co.*, 282 U.S. 813.

III.

There is No Substantial Question of Federal Law.

The petitioner attempts to convert the unique facts of the cause into a broad federal question by references to the "giant insurance industry" and an asserted resultant necessity of an elastic interpretation of the McCarran-Ferguson Act by this Court for the protection of the public (Petition at pp. 12 and 13).

It is apparent that no such broad ". . . principles the settlement of which is of importance to the public as distinguished from that of the parties . . ." (*Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393) stem from the instant cause.

It involves a local, isolated incident, namely, the award of an insurance contract by the Commonwealth of Massachusetts.

As the lower courts recognized, the awarding of that contract was completely "regulated" by Massachusetts, and the Sherman Act had no application to the facts.

Although the Court did not find it necessary to discuss the point in its decision, it is obvious that the transaction alleged did not show injury to the public or substantial effect upon interstate commerce. On the contrary, the alleged purpose of the combination of defendants was for "meeting or bettering" the low bid of Minnesota (R. pp. A15-A16). Not harm but benefit to the public was contemplated if the Commonwealth and its employees may be deemed the public.

In essence this case involves a simple intrastate transaction with no such important federal ramifications as asserted by petitioner. Its factual situation renders the cause unique and hardly an authority for the dire assertion by petitioner that "As a result citizens of thirty-two of the forty-eight states are without any relief whatever

from violations of the Sherman Act in the insurance business: they are at the mercy of the giant insurance industry" (Petition, pp. 12-13). Application for certiorari by hyperbole ought not be countenanced.

In truth, this cause was solely a Massachusetts problem. To have upheld this complaint would have constituted an indirect repudiation of an award of an insurance contract by the Commonwealth of Massachusetts. Such action, in effect, where no state court or administrative proceeding had been brought to quash or invalidate the award, would have constituted an interference with the sovereign acts of the Commonwealth.

See *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

LOTHROP WITHINGTON,
CHARLES C. WORTH,
73 Tremont Street,
Boston 8, Massachusetts,
Attorneys for Respondents Columbian National Life Insurance Company and Loyal Protective Life Insurance Company.

Withington, Cross, Park & McCann,
73 Tremont Street,
Boston 8, Massachusetts,
Of Counsel.